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No. 89-1085

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

SAM SEXTON, JR. ..... *Petitioner*

vs.

ARKANSAS SUPREME COURT COMMITTEE
ON PROFESSIONAL CONDUCT ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STEVE CLARK
Attorney General

BY: R. B. FRIEDLANDER
Solicitor General
200 TOWER BUILDING
323 CENTER STREET
LITTLE ROCK, ARKANSAS 72201
(501) 682-3637

Attorneys for Respondent

ARKANSAS LEGISLATIVE DIGEST, INC.

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QUESTIONS PRESENTED

Respondent disagrees with Petitioner's characterization of facts contained in the record which form the basis for his presented questions. Therefore, Respondent would submit the following:

I.

WHETHER RESPONDENT'S RULES AND PRACTICE WHICH PROVIDE FOR EVIDENTIARY SUBMISSION TO IT PRIOR TO A HEARING (AT THE ACCUSED ATTORNEY'S OPTION), OFFENDS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

II.

WHETHER THE RESPONDENT COMMITTEE MAY SUSPEND AN ATTORNEY'S LICENSE UPON A FINDING OF VIOLATION OF A DISCIPLINARY RULE PURSUANT TO A "PREPONDERANCE OF THE EVIDENCE" STANDARD WITHOUT VIOLATING THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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STATEMENT OF THE CASE

On January 23, 1987, Respondent Committee charged Petitioner with violation of Rules 1.8 and 8.4 of the Model Rules of Professional Conduct as adopted by the Arkansas Supreme Court and in effect on that date. The charge was brought pursuant to a complaint filed with Respondent Committee. Subsequent to the filing of the complaint, Petitioner filed a response, but requested no hearing. Pursuant to Rule 5(B)(1) & (2), Petitioner had been furnished with a copy of the formal complaint and advised he was entitled to file a written response in affidavit form with any supporting evidence desired. Petitioner was also advised that a hearing

could be requested before any vote was taken by the Committee and that, in the absence of such request, the file would be sent to the Committee for vote by ballot as provided in the Rules of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law ("Rules"). Petitioner was also notified that should he be dissatisfied with the ballot vote, his right to a subsequent hearing would be preserved. Petitioner requested no hearing, but instead submitted a response to the Committee. Copies of the complaint, response and a synopsis of both were sent to individual Committee members along with paper ballots. The individual members forwarded the completed ballots back to the executive secretary of the Committee who compiled the results. After learning that the Committee had voted to suspend his license for a one-year period, Petitioner Sexton requested a public hearing which was held August 29, 1987. After that de novo hearing, the Committee voted to suspend Petitioner's license. That decision was appealed by Petitioner to the Arkansas Supreme Court for its de novo review and on March 28, 1988, that Court reversed and remanded the action of the Committee, stating that Petitioner could only be charged with violating the Code of Professional Responsibility, which was in effect at the time he committed the alleged offense — in 1983. *Sexton v. Supreme Court Committee on Professional Conduct*, 295 Ark. 141, 747 S.W.2d 94 (1988) (Sexton I). Petitioner was then charged with violation of Disciplinary Rule 5-104(A) of the Code of Professional Responsibility ("DR 5-104(A)") and the Committee voted to suspend his license for one year after hearing two days of testimony, on December 3, 1988 and February 11, 1989. Petitioner appealed this final decision to the Arkansas Supreme Court. As noted in the Petition for Writ of Certiorari, *between* the first and final decisions of the Arkansas Supreme Court, Petitioner filed a "Petition for Prohibitory and Mandatory Relief" which was denied on the basis that all issues presented therein could be raised on appeal. *Sexton v. Supreme Court Committee on Professional Conduct*, 297 Ark.

154-A, 761 S.W.2d 602 (1988) (Sexton II).

In its decision dated July 10, 1989, the Arkansas Supreme Court held Petitioner failed to comply with the terms of DR 5-104(A) and upheld the decison of the Committee to suspend Petitioner's law license to practice in state courts for a period of one year. *Sexton v. Supreme Court Committee on Professional Conduct*, 299 Ark. 439, 774 S.W.2d 114 (1989) (Sexton III).

On July 28, 1989, Petitioner filed a Petition for Rehearing with the Arkansas Supreme Court and a Motion for Stay of Mandate pending his application for certiorari to this Court. The Arkansas Supreme Court denied the Petition for Rehearing on September 11, 1989, and granted Petitioner's Motion to Stay the Mandate pending his Petition for Writ of Certiorari.

This Response to Petitioner's Petition for Writ of Certiorari is now submitted.

Respondent notes that there are several misleading statements made by Petitioner in his Statement of the Case.

First, the rules of Respondent Committee do not require the Committee to vote to take action against an attorney accused of rule violations *prior* to holding a hearing. Instead, Rule 5(B)(1) & (2) provide that an accused attorney may request a hearing before any vote is taken by the Committee and that when such a request has been made, no ballots shall be sent. Rather, a public hearing shall be held in accordance with the Committee rules.

Further, although Rule 7(A) provides that if the Committee finds there is "a reasonable ground" to believe that the attorney has been guilty of misconduct it may take disciplinary action, this Rule was not applied in any of Petitioner's hearings before the Committee and/or the Arkansas Supreme

Court. Rather, those bodies made determinations based upon a "preponderance of the evidence" standard. This matter will be more fully discussed in the argument portion of this Response.

Finally, although Petitioner is correct that no provision is made in the Rules for appeal, prior to the original complaint being filed against a Petitioner with the Committee, the Arkansas Supreme Court had certainly allowed appeals to it from a Committee adjudication. *See Walker v. Supreme Court Committee on Professional Conduct*, 275 Ark. 158, 628 S.W.2d 552 (1982). That Court expressly declared a right to appeal exists in *Sexton v. Supreme Court Committee on Professional Conduct*, 295 Ark. 141, 747 S.W.2d 94 (1988).

REASONS FOR DENYING THE WRIT

I.

RESPONDENT COMMITTEE DID NOT VIOLATE PETITIONER'S DUE PROCESS RIGHTS BY SUBMITTING THE CASE FOR DISCIPLINARY RULING PRIOR TO A HEARING AS THAT WAS PETITIONER'S CHOICE.

Contrary to Petitioner's assertion, his petition presents no issues of significance to another attorney involved in disciplinary proceedings. As stated, Rules 5(B)(1) & (2), (as found at Appendix Pg. 44 of the Petition), provide that any accused attorney may request a hearing before a vote is taken by the Committee. In the absence of such a request, the file is sent to the Committee for vote by ballot. Nothing in the mentioned procedure precludes an attorney from a right to a subsequent hearing should he/she be dissatisfied with the ballot vote. Where an attorney has initially requested a hearing, no ballots are sent and the matter is set for public hearing immediately.

In this case, Petitioner did not request a hearing initially, but instead chose to submit a written response. That written response was forwarded to members of the Committee who proceeded to vote, by paper ballot, on whether violation of ethical rules had occurred and subsequently, a sanction to be imposed.

While this Court has recognized *In Re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), that the disbarment of an attorney is a punishment or penalty, it has only stated that such proceedings are quasi-criminal in nature. *Id.* at 550. Accordingly, this Court has held that an accused attorney is entitled to procedural due process. The *Ruffalo* holding has been adopted and applied in the *Sexton* trilogy of cases. *See*

Sexton III, at 299 Ark. 439, 774 S.W.2d 114 (1989), where the Arkansas Supreme Court stated:

> Certainly, we could never tolerate denial of the right to practice law without fully affording due process to the practicing attorney.

Id. at 446.

In rejecting Petitioner's argument that the Committee should have recused itself from hearing any further evidence as to his case because some members had expressed opinions prior to the hearing, by their ballot vote, the Arkansas Supreme Court noted that the rules of the Committee had been followed in every respect. It stated:

> The mere happenstance that a trier of fact has expressed an opinion on a matter under consideration does not automatically disqualify that person from further participation. Frequently we reverse a trial judge and remand the case for another trial. Even though we may reverse a trial judge, on remand the judge is considered fair and impartial.

Id. at 448.

Also, the Arkansas Supreme Court discussed several of the cases cited by Petitioner as allegedly supportive of his position that because a hearing examiner or judge sat as a factfinder at a previous stage, he or she should be disentitled to sit in any subsequent stage just because they ruled against a party in the first hearing of the matter. The Arkansas Supreme Court distinguished those cases cited by Petitioner and Respondent goes further to distinguish these same cases cited by Petitioner in his first point.

Of course, Respondent does not deny that procedural due process applies to attorney disciplinary proceedings.

However, attorney disciplinary proceedings are analogous in no way to the situations presented in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) or its predecessor, *Morrisey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). In *Gagnon, supra*, this Court held that it was unreasonable and violative of due process to have parole officer (Gagnon) or probation officer (Morrisey) sit as tribunals to make determinations of whether reasonable grounds existed for revocation of parole and/or probation. This Court determined that such a finding should be made by someone not directly involved in the revocation process, as were parole and probation officers, by virtue of their roles and functions.

Certainly, in attorney disciplinary proceedings, no issue of the loss of freedom or liberty is presented. This fact alone takes this type of cases out of the scope of *Gagnon, supra*, and *Morrisey, supra*. Additionally, Respondent Committee does not act, as do parole and probation officers, directly to do initiate investigations concerning an accused, recommend whether proceedings be instituted against an accused and then subsequently sit as a tribunal over that matter. Rather, Respondent Committee responds to complaints filed by the public. Any independent investigation is accomplished by its executive secretary and evidentiary matters are presented to Committee members in a balanced and impartial manner. Thus, the constitutional flaw found in the *Gagnon* and *Morrisey* decisions is not present here. Rather, the situation posed in this case is much more similar to *Withrow v. Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), where a physician's license was at issue. There, this Court stated:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in

> those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies in human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id. at 47.

Further, this Court noted that similar claims had been squarely rejected in its previous decisions. For instance, in *FTC v. Cement Institute*, 333 U.S. 683, 68 S.Ct. 793, 92 L.Ed.2d 1010 (1948), it was held that no decision of this [the United States Supreme] Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues the second time, although these issues involve questions both of law and fact. *Id.* at 702-703.

Also cited with approval by the Arkansas Supreme Court in *Sexton III*, was *NLRB v. Donnelly Garment Company*, 330 U.S. 219, 236-237, 67 S.Ct. 756, 91 L.Ed. 854 (1947):

> Certainly, it's not the rule of judicial administration that . . . a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings. We find no warrant for imposing upon administrative agency a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing.

> Applying these precedents in *Withrow, supra*, this Court found no specific foundation had been presented for suspecting that the [examining board for physicians] had

> been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at [a] contested hearing. The mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the board members at a later adversary hearing.

Sexton III at 448.

While the facts of *Withrow* are similar to those presented in this case, here Petitioner cannot show that any evidence was presented to the deciding tribunal that did not contain whatever arguments, by way of written response and affidavits, he wished to make on his own behalf. Nor can he show he was not (1) given notice of the complainant's position, (2) allowed discovery, (3) allowed to present testimony at hearing, or (4) cross-examine witnesses. Indeed, Petitioner was accorded much more due process than the physician in *Withrow*.

Simply, this Court has dealt squarely with Petitioner's first argument previously in *Withrow* and Petitioner presents no reason to change that ruling based on the record of that case. In order for this Court to grant certiorari in this matter, Petitioner has to show that the factual issue of whether the Committee members were automatically biased by having reviewed a complaint and response initially and later holding a public hearing on the issue of his violation of ethical rules, is significant enough to the body of federal law to warrant this Court's review.

No conflict among the circuit courts of appeals is presented, no radical departure from precedent by the Arkansas Supreme Court has been presented and no important question under the Constitution of the United States as is required by 28 U.S.C. §1254(1) is present here. All procedural due process elements have been accorded Petitioner and the Petition for Writ of Certiorari should be denied.

Plainly the Rules do not provide that only after an adverse ruling may an accused attorney request a public hearing. Moreover, the recitation of facts in *Sexton III* shows that Petitioner did not initially request any hearing, but rather, voluntarily chose to submit his case by way of response. Only after he learned of an adverse ruling by the Committee did he exercise his right to have a hearing.

Finally, Petitioner vaguely asserts facial unconstitutionality of the Rules of the Court Regulating Professional Conduct of Attorneys at Law by stating those rules do not require the Committee make available to the accused attorney results of its investigation, memoranda submitted by the executive secretary or any other material except the affidavit of the complainant. Petitioner was permitted full discovery in this case, as the record reflects.

Petitioner's first point is totally without merit and certiorari should be denied as to his first point.

II.

RESPONDENT COMMITTEE UTILIZED A "PREPONDERANCE OF THE EVIDENCE" STANDARD IN DETERMINING PETITIONER'S CASE AND THE ARKANSAS SUPREME COURT UTILIZED THIS STANDARD IN ITS DE NOVO REVIEW OF PETITIONER'S CASE.

It is difficult to discern the nature of all Petitioner's arguments in his second point. Apparently, he contends that because the Arkansas Supreme Court had not rendered a decision prior to 1983 interpreting the "full disclosure" provision of DR 5-104(A), that his due process rights were violated because he did not have notice of what conduct was prohibited. Additionally, Petitioner contends that Rule 7(a) of

the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law violates his due process rights because it only provides that the Committee find a "reasonable ground to believe" that the attorney has committed an ethical violation.

Petitioner's arguments are totally without merit. Just because the Arkansas Supreme Court had never had occasion to interpret the meaning of the "full disclosure" provision of DR 5-104(a) prior to the decision in his case, does not mean that there was any "retroactive" application of its judicial construction. Carried to its logical conclusion, Petitioner's argument would preclude a court from considering precedential decisions rendered after the facts occurring in any given case. Such a conclusion is ridiculous.

Plus, Petitioner was charged with knowledge of rules applicable to his law license, in 1983.

The Arkansas Supreme Court merely relied on *In Re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985), as persuasive in interpreting the provisions of DR 5-104(a). That Arizona case is not precedent in Arkansas, but since the Arkansas Supreme Court had never construed the rule, it was within that court's prerogative to rely on other jurisdictions.

Many cases, other than *Neville, supra*, which was decided in 1985, stand for the proposition that merely advising a client to seek outside counsel concerning a business transaction is not sufficient to meet the full disclosure requirement of DR 5-104(a). For instance, in *In Re Bartlett*, 283 Or. 487, 584 P.2d 296 (1978), cited by Petitioner, the Supreme Court of Oregon held that the failure to advise clients to seek independent *legal counsel* with respect to the purchase of a duplex in which the lawyer held an interest and the transfer of the client's interest in that duplex without the consent of the

receiver warranted suspension of that attorney for six months. The Supreme Court of Oregon noted that there was "no record" as to whether or not the accused made a "full disclosure preceding the [clients] consent." *Id.* at 300. In *Matter of Kali*, 124 Ariz. 592, 606 P.2d 808 (1980), the Supreme Court of Arizona upheld the suspension of Mr. Kali's license for entering into a business relationship with a client without advising the client to seek outside counsel. The only outside advice received by the client came from an accountant who had been retained by the attorney and who had no independent relationship with the client.

Numerous cases decided prior to Petitioner's entry into a business transaction with a client in 1983, had been decided (and the decisions published) which held that merely advising a client to seek outside counsel concerning a transaction is insufficient to provide "full disclosure" as is contemplated in DR 5-104(A). Certainly, numerous cases have been decided *after 1983 holding the same. See In Re Neville, supra; In Re Richard V. Watson*, 482 N.E.2d 262 (Ind. 1985); *In Re O'Byrne*, 298 Or. 535, 694 P.2d 955 (1985); *In Re Goldstein*, 103 Ill.2d 123, 468 N.E.2d 959 (Ill. 1984); *In Re Pyatt*, 312 S.E.2d 553 (S.C. 1984).

Additionally, Petitioner asserts that the failure to enter findings of fact and conclusions of law by Respondent Committee violates his due process rights, citing *Wolff v. McDonnell*, 418 U.S. 539, 563, 94 S.Ct. 2693, 41 L.Ed.2d 935 (1974) for the proposition that "due process" requires the factfinder to state the facts upon which its decision is founded and to state the reasons or conclusions of law which support the action taken.

Petitioner has not been convicted of a felony in this case and the panoply of constitutional rights does not attach to the proceeding which resulted in his suspension. Even were the lack of entry of findings and conclusions of law found to be

error, that error is harmless and/or has been cured by the specific, thorough and meticulous factfinding engaged in by the Arkansas Supreme Court in its de novo review of the allegations against Petitioner. *See Sexton III*, pages 441-444.

Specifically, the Arkansas Supreme Court stated:

> In reviewing this case de novo from the record of the proceedings before the Committee, we have determined that the clients expected the appellant [petitioner] to exercise his professional judgment for their protection in this transaction. The appellant [petitioner] simply did not make the "full disclosure" required of him by DR 5-104(A) when he solicited the loan from his clients.

Finally, Petitioner submits that rules which allow the Respondent Committee to sustain findings upon a quantum of proof *less* than a "reasonable ground to believe" violate the due process clause of the Fourteenth Amendment.

Respondent assumes Petitioner means to state that a quantum of proof which is "a reasonable ground to believe" violates the due process clause. However, his argument is irrelevant as the standard of proof applied in each and every proceeding before the Committee and the Arkansas Supreme Court concerning Petitioner a "preponderance of the evidence" standard was applied in determining whether violation of ethical rules had occurred.

In a lengthy discussion in *Muhammed v. Arkansas Supreme Court Committee on Professional Conduct*, 291 Ark. 29, 722 S.W.2d 280 (1987), the Arkansas Supreme Court determined that the proper standard of review in a case appealed to it from the Respondent Committee was whether the findings below were clearly erroneous or clearly against the

preponderance of the evidence. *Id.* at 35. The Arkansas Supreme Court held at 36:

> In *Walker v. Supreme Court of Arkansas Committee on Professional Conduct*, 275 Ark. 158, 628 S.W.2d 552 (1982), we had before us an appeal from discipline administered directly by our Committee. *Although not explicitly, we apparently applied the same standard of review we had applied in the reviews of court decisions.* We held the findings of the Committee to be supported by a preponderance of the evidence and said: 'the findings of the Committee, in this respect [that the appellant had violated the code] are not contrary to the weight of the evidence and must be affirmed,' citing *Hurst v. Bar Rules Committee of the State of Arkansas*, 202 Ark. 1101, 155 S.W.2d 697 (1941). (Emphasis added.)

At page 447 of *Sexton III*, from which this Petition is taken, the Arkansas Supreme Court held:

> In reviewing the actions of the Committee we look to the preponderance of the evidence and affirm the action taken by the Committee unless it is clearly against the preponderance of the evidence. (Citation omitted.)

The arguments of Petitioner in his second point are all without merit, lacking foundation in law or the facts presented in this case.

Certainly, Petitioner does not assert the rights of all attorneys within the State of Arkansas as he would have this Court believe. Indeed, he does not even specifically relate to this Court how the actual implementation of the Rules of Respondent Committee or the de novo review of his case by the Arkansas Supreme Court deprives him of any recognized due process rights.

Facially, Petitioner's claims do not fit within any of the traditional areas meriting review by this Court. His case presents no "important question under the Constitution of the United States" as is required to gain the attention of this Court.

CONCLUSION

For all the foregoing reasons and based upon the foregoing precedents, the Petition for Writ of Certiorari filed by Petitioner should be denied.

Respectfully submitted,

STEVE CLARK
Attorney General

BY: R. B. FRIEDLANDER
Solicitor General
200 TOWER BUILDING
323 CENTER STREET
LITTLE ROCK, ARKANSAS 72201
(501) 682-3637

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, R. B. Friedlander, Solicitor General, do hereby certify that I have served the foregoing, by mailing a copy of same, U.S. Mail, postage prepaid thereon to the Honorable Dale Price, Attorney at Law, 211 Spring Street, Little Rock, Arkansas 72201 on this 8th day of March, 1990.

/s/ R. B. Friedlander